92-797

No. _____

Supreme Court
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In The

Supreme Court of the United States

October Term, 1992

RAYMOND GALLEGOS and LOURDES GALLEGOS,

Petitioners,

vs.

THE CITY OF ESPANOLA,

Respondent.

Petition For A Writ Of Certiorari To The New Mexico Supreme Court

PETITION FOR WRIT OF CERTIORARI

WINSTON ROBERTS-HOHL
Post Office Box 2463
Santa Fe, New Mexico 87504
(505) 988-9658

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Does not the Fifth Amendment to the United States Constitution require a condemning subdivision of a state to pay just compensation for the property taken in eminent domain?

2. Does not the Due Process Clause of the Fourteenth Amendment to the United States Constitution require a state appellate court to abide by its appellate rules and by *stare decisis* (unless there is a need for change)?

PARTIES TO THE PROCEEDINGS

The only parties to the proceedings are listed in the caption. Two other parties were present in the trial court but they were dismissed prior to the trial below and were not parties in the New Mexico Supreme Court.

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Petition For A Writ Of Certiorari To The New Mexico Supreme Court

PETITION FOR WRIT OF CERTIORARI

Raymond Gallegos and Lourdes Gallegos, petition for Writ of Certiorari to review the Decision of the Supreme Court of the State of New Mexico in this case.

OPINION BELOW

The Decision of the Supreme Court of the State of New Mexico will not be reported. It is attached infra, pages a-1 to a-12.

JURISDICTION

The Decision of the Supreme Court of the State of New Mexico, the State's Court of last resort, was filed on July 8, 1992. (Appendix a). A Petition for Rehearing was denied on August 10, 1992. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States reads in pertinent part:

> [N]or shall any State deprive any person of liberty or property without due process of law;

RULES OF NEW MEXICO INVOLVED IN THE CASE

Rule of Appellate Procedure

12-405 Opinions.

A. **Necessity.** It is unnecessary for the appellate court to write formal opinions in every case. Disposition by order, decision or memorandum opinion does not mean that the case is considered unimportant. It does mean that no new points of law, making the decision of value as a precedent, are involved.

SCRA 1986, 12-405(a) NMSA 1978

FACTS MATERIAL TO CONSIDERATION OF QUESTIONS PRESENTED

In this case Raymond Gallegos and his wife, Lourdes entered into a purchase agreement with Ron Schneider and his wife Ronda to purchase 11.27 acres of commercial real estate located within the Espanola City limits for the listed price of $240,000. The Schneiders' real estate agents handled all negotiations and prepared all documents since the Schneiders were absentee owners of the property residing in California. The Schneiders were willing to sell the property to the Gallegoses at the listing price (which was well below market value) rather than spend the time necessary to develop the property themselves.

The Mayor of the City of Espanola (upon learning of the agreement between the Schneiders and the Gallegoses) personally demanded the Gallegoses not purchase the property.

The Gallegoses went forward with the purchase and within one week of the Schneider/Gallegos agreement, the Mayor caused a suit in condemnation to be filed (in a manner contrary to the statutory requirements for the filing of suits in condemnation by political subdivisions in New Mexico) seeking the condemnation of the 11.27 acres. The City's suit named the Schneiders as Defendants (but failed to name the Gallegoses as defendants) in both the initial Petition and the Amended Petition.

The Gallegoses intervened and became parties to the condemnation proceedings. Prior to trial the Schneiders were dismissed as defendants upon their acceptance of an amount equal to the selling price they had agreed upon with the Gallegoses.

At trial the court, on the uncontroverted testimony of the Gallegoses and Ms. Perraglio, Mr. Trujillo, and Mr. Beasley, (real estate agents of the Schneiders) found that a valid agreement existed between the Schneiders and the Gallegoses for the purchase of the property; that the property being condemned had a value of $901,600.00; and that the Gallegoses were entitled to receive the value of the property together with interest less the $240,000 which had been received by the Schneiders for their interest.

The Schneiders did not testify at trial.

The trial court's Judgment had (alternatively) dismissed the suit in condemnation and allowed the City to refile if it chose that course of action. This portion of the Judgment was not considered by the New Mexico Supreme Court as the Gallegoses had conceded at oral argument that City's appeal should be considered on the trial court's determination as to value.

The New Mexico Supreme Court allowed the City (Condemnor) to appeal upon a claim that there was no valid contract between the Condemnees, Schneiders and Gallegoses, even though the City was not a party to or beneficiary of the purchase agreement.

The decision of the New Mexico Supreme Court, (acting strictly as an appellate court), recites its own findings of fact and conclusions of law which it based in part upon supposition regarding the Schneiders' views even though they had not testified at trial. The decision of the New Mexico Supreme Court totally ignored the findings of fact and conclusions of law set out in the trial court's judgment and ignored the City's failure to follow

proper appellate procedure in prosecuting its appeal. Likewise, the New Mexico Supreme Court failed to follow *stare decisis* by ignoring the doctrines of standing and equitable conversion, and by its failure to abide by its own appellate rules of procedure.

The New Mexico Supreme Court's decision failed to rule on the trial court's determination of the value of the property. It further failed to decide who is entitled to the over six hundred thousand dollars by which the property value exceeded the amount the City paid.

A timely motion was filed seeking a rehearing. The Motion set out in detail the recorded trial testimony and legal theories which were ignored in the decision. The Motion pointed out that by not deciding the issue of just compensation, the Court violated the Gallegoses' rights under the just compensation clause of the Fifth Amendment. The motion alerted the Court that it was ignoring *stare decisis* with respect to established laws on standing, on appellate review, and on the doctrine of equitable conversion.

The New Mexico Supreme Court summarily refused to reconsider the matter.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The decision of the New Mexico Supreme Court, reversing the decision of the trial Court, directly violates the Fifth Amendment to the Constitution of the United States which provides in pertinent part: "nor shall private

property be taken for public use, without just compensation . . . " The decision conflicts with decisions of this Court interpreting the mentioned clause of the Fifth Amendment.

Beginning with *Backus v. Fort Street Union Depot Co.*, 169 U.S. 557, 573 (1898) this Court approved the following:

> "[W]hen this power [of eminent domain] is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive, or exorbitant, but just compensation."

This Court has likewise said that just compensation required by the Fifth Amendment consists of "a full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). Furthermore this Court has explained the rule that just compensation "is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future . . . " *Chicago, B & Q R.R. Co. v. Chicago*, 166 U.S. 226, 250 (1897).

In this case, the trial Court found the value of the condemned property to be $901,600.00. However, under the decision of the New Mexico Supreme Court, herein appealed from, the City of Espanola was required to pay only $240,000 for the property.

In its decision, the New Mexico Supreme Court did not address the question of just compensation for the 11.27 acres that was condemned.

In a Motion for Rehearing the Petitioners invited this omission to the Court, pointing out that the result is in violation of the just compensation requirement of the Fifth Amendment. In part, the Petitioners relied on *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886 (1992), pointing out the proposition that just compensation must be awarded even for an incidental taking. The New Mexico Supreme Court's response to the Motion for Rehearing was a summary denial without addressing that serious federal question. For this reason alone the Writ should be allowed.

Second, the manner in which the New Mexico Supreme Court decided that the Petitioners did not have any contract rights contravenes the Fourteenth Amendment which proscribes the deprivation of "property without due process of law." Under New Mexico Rules of Appellate Procedure the decision in this case may not be used to change existing law. SCRA 1986, 12-405(a), NMSA 1978. In its decision, without expressly overruling precedent, the New Mexico Supreme Court did not follow its established standard on review. Nor did it follow its precedent for standing on appeal; nor its doctrine of equitable conversion. The Rules of Appellate Procedure adopted by the New Mexico Supreme Court clearly spell out that it may not establish new points of law in a decision:

> It is unnecessary for the appellate court to write formal opinions in every case. Disposition by order, decision or memorandum does not

> mean that the case is considered unimportant. It does mean that no new points of law, making the decision of value as precedent, are involved.

SCRA 1986, 12-405(A).

In the decision here, the New Mexico Supreme Court ignored *stare decisis* in three significant areas. First it overlooked its policy on standing. Second it ignored its case law on the standard on review, ignoring factual findings supported by substantial evidence made by the trial Court. Third, it overlooked its long standing precedents on the doctrine of equitable conversion.

In their Motion for Rehearing, the Petitioners reminded the New Mexico Supreme Court of its prior holding that until there is an overruling of precedent *stare decisis* has the force and effect of law. *State v. Jones*, 44 N.M. 623, 107 P. 2d 324 (1940); *City of Las Vegas v. Oman*, 110 N.M. 424, 796 P. 2d 1121 (Ct. App. 1990). They cited to this Court's holding in *Barnett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932):

> "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions."

Nevertheless, without overruling precedent the New Mexico Supreme Court failed to follow its established

case law with respect to standing, its standard of appellate review and the doctrine of equitable conversion.

In its appeal, the City raised an issue concerning the amount of damages. However, the New Mexico Supreme Court did not address the amount of damages. Rather it permitted the City to argue the relative rights of the two condemnees. This decision directly conflicts with New Mexico law on standing. In *State ex rel. State Highway Commission v. Sherman,* 82 N.M. 316, 481 P. 2d 104 (1971), the New Mexico Supreme Court declared that the condemning agency does not have an interest in apportionment between condemnees.

> The matter of apportionment is of no concern to the Highway and is an issue in which only Shermans and Runyan are involved. 4 Nichols on Eminent Domain par. 12.42[2] at 306. The record Judgment was entered in favor of Runyan after trial on the apportionment.

(82 N.M. 318).

This doctrine of standing appears to be universal in the jurisprudence of these United States. *United States v. Adamant Co.,* 197 F. 2d 1 (9th Cir. 1952) cert denied 344 U.S. 903 held that the condemnor has no appealable interest in that portion of a Judgment apportioning the compensation awarded. In *United States v. Dunnington,* 146 U.S. 338, 353 (1892) this Court cited with approval, the holding in *Haswell v. Vermont Central Railway,* 23 Vt. 228 that the railroad had no interest in the apportionment, and "having no interest in the matter, it had no right to appeal."

Next, the existing case law in New Mexico is that a reviewing court will not substitute its views for the fact finder so long as the factual findings are supported by substantial evidence. On appeal, the reviewing court is bound by the trial Court's findings of fact unless they are demonstrated to be clearly erroneous or not supported by substantial evidence. *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 817 P. 2d 238 (1991); *Navajo Academy Inc. v. Navajo Mission School*, 109 N.M. 324, 785 P. 2d 235 (1990). In this case the New Mexico Supreme Court ignored the specific findings of the trial Court and made findings which were contrary to the testimony at trial.

Finally, the New Mexico Supreme Court ignored its established precedent on the doctrine of equitable conversion. In *Hertzmark-Parnegg Realty, Inc. v. Hunt*, 99 N.M. 184, 185, 656 P. 2d 234 (1982), the New Mexico Supreme Court reaffirmed its holding in *Mesich v. Board of County Commissioners*, 46 N.M. 412, 129 P. 2d 974, 976 (1942) that the execution of a purchase agreement bestows equitable ownership of the subject property on the purchasers:

> "New Mexico has long recognized the doctrine of equitable conversion which holds that the execution of a purchase agreement places equitable ownership of that property in the person shown as the purchaser. In *Mesich v. Board of County Commissioners*, 46 N.M. 412, 416-17, 129 P. 2d 974, 976 (1942), this Court discussed the equitable doctrine:
>
> > 'In law the effect of a contract whereby the owner agrees to sell and another agrees to purchase a designated tract of land, the vendor remains the owner of the legal title to the land; he holds the legal title * * * But, in

> equity the vendee is held to have acquired the property in the land and the vendor as having acquired the property in the price of it. The vendee is looked upon and treated as the owner of the land and the equitable estate thereof as having vested in him. He may convey it or encumber it, devise it by will and on his death it descends to his heirs and not to his administrators. The legal title is held by the vendor as a naked trust for the vendee and any conveyance by him to one not a bona fide purchaser for value is ineffective to pass title. The vendee must bear all accidental injuries or losses done to the soil or appurtenances, by the operations of nature or third parties, and is entitled to recover all damages for injury thereto. The vendor, before payment, holds the title as trustee for security only. [Citations omitted.]

(99 N.M. at 185). In the instant case the New Mexico Supreme Court did not consider the purchase agreement and the equitable rights it vested in the Petitioners.

CONCLUSION

Because the City of Espanola was permitted to exercise its power of eminent domain but was not required to pay just compensation as required by the Fifth Amendment, the Writ should issue to review the decision of the New Mexico Supreme Court.

Additionally, the Writ should issue because Petitioners' right to due process of law under the Fourteenth

Amendment was denied when the State Court, without overruling precedent, ignored its rules and prior holdings in the area of standing, the standard on review and the doctrine of equitable conversion.

Based on the foregoing, the Petitioners respectfully pray that the Writ be issued.

Respectfully Submitted:

WINSTON ROBERTS-HOHL
P.O. Box 2463
Santa Fe, New Mexico 87504
(505) 988-9658

Attorney for Petitioners

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

CITY OF ESPANOLA,

Plaintiff-Appellant,

NO. 20,062

vs.

RONALD J. SCHNEIDER and
RONDA A. SCHNEIDER,

Defendants,

and

RAYMOND GALLEGOS and
LOURDES GALLEGOS, his wife,

Intervenors-Appellees.

APPEAL FROM THE DISTRICT COURT OF
RIO ARRIBA COUNTY
Joe Cruz Castellano, District Judge

Coppler & Aragon
Paul D. Mannick
Santa Fe, NM — for Appellant

Winston Roberts-Hohl
Santa Fe, NM

George M. Scarborough
Santa Fe, NM — for Appellees

DECISION

(Filed July 8, 1992)

FROST, Justice.

This 1988 condemnation action, brought by the City of Espanola, concerns 11.27 acres of undeveloped land situated in Espanola, New Mexico. At the time of the

filing of the condemnation suit, Ronald J. and Ronda A. Schneider had title to and possession of the subject property. Just prior to the initiation of the proceedings, the owners listed the property with a local realtor at an asking price of $240,000. Intervenors, Raymond and Lourdes Gallegos, claim an interest in the property based upon an allegedly binding purchase agreement with the Schneiders. The City has taken and developed the subject property for public purpose.

On November 22, 1988, the court entered a stipulated order granting the City immediate possession of the property upon its deposit of $240,000 into the court registry, authorizing the Schneiders to withdraw $160,000 from the deposit (2/3 of the total amount), and permitting the Gallegoses to intervene. On December 16, 1988, the Gallegoses filed their complaint in intervention seeking compensation for the City's taking of an alleged equitable interest in the subject property.

On August 17, 1989, after a hearing on several motions by all parties, the district court entered a partial final judgment in condemnation in favor of the City. The order transferred title to the property to the City upon payment of $240,000 to the Schneiders, who were then dismissed as parties to the case. The judgment did not adjudicate any interest of the intervenors and was made subject to their right to pursue litigation against the City. Intervenors were expressly precluded from asserting any claims against the Schneiders, and, further, were directed to "provide the Schneiders a hold harmless and waiver agreement" and to "obtain a similar waiver agreement from [the realtor] waiv[ing] any claims she has or may have against the Schneiders."

In their complaint in intervention, intervenors alleged an interest in the subject property without identifying the basis therefore, but their July 22, 1988, motion to intervene claimed they were contract purchasers. Although subsequently denied, the City's motion to dismiss the complaint and memorandum in support filed December 21, 1988, addressed the lack of grounds upon which intervenors based their claim. On the same date the City filed a motion for summary judgment concerning the issue of the value of the property.

After a four-day bench trial in April 1990, the court issued a letter decision ruling in favor of intervenors and awarding them $245,000.00 in damages, *i.e.* property value of $485,000 less $240,000 purchase price. The basis for the judgment was the court's finding that (1) the Schneiders and Gallegoses "signed all necessary documents for purchase and sale of said land prior to Plaintiff's condemnation;" (2) "The final negotiations were concluded and finalized prior to any defective condemnation suit by the City;" and, (3) "all requirements for purchase and sale of property in question had been concluded" except "delivery of the deed to the Gallegos [sic]" due to malicious and intentional interference by the City and its counsel.

A significant amount of time elapsed between trial and entry of judgment despite the City's urging through various motions. After a hearing on intervenors' motion to dismiss the condemnation petition and for damages, attorney fees and costs, the court issued a June 7, 1991, order granting all of intervenors' requested remedies, and quieting title to the property in the Gallegoses. The City was ordered to remove itself, its agents and employees

from the property and was permanently enjoined from entry thereafter. Upon the City's petition for writ of superintending control, this court, in case number 19,901, on June 19, 1991, permanently enjoined the district court judge from enforcing the injunction and ordered him to take no further action other than to enter findings of fact, conclusions of law, and a judgment from which the City could appeal.

In its August 6, 1991 judgment, the court adopted findings and conclusions virtually identical to those requested by intervenors and entered a judgment that dismissed without prejudice the City's condemnation suit, quieted title in fee simple in the Gallegoses, and awarded them $7,000 in costs, $41,600 in attorney fees, all to be offset against the $240,000 previously paid by the City. Alternatively, the judgment quieted title in the City "upon the payment to Gallegos of the sum of $926,584.00."

On appeal, the City challenges intervenors' attempt to call into question the legitimacy of the condemnation suit at trial and raises issues concerning the validity of the offer to purchase agreement as it relates to forming the basis for a compensable interest in the property for the intervenors. We reverse the judgment, finding no enforceable contract between the buyers and sellers as a matter of law, and, thus, need not reach the issue of valuation.

INTERVENORS ARE ESTOPPED FROM CHALLENGING AT TRIAL THE LEGITIMACY OF THE CONDEMNATION PROCEEDINGS

Many of the court's findings and conclusions relate to the issue of the legitimacy of the condemnation action, a matter which should not have been tried as a result of the November 22, 1988, stipulated agreement.[1] Before filing the order, the court sent a letter to each party, which stated in part: "Enclosed is a copy of an Order which I propose to file regarding the parties' agreement. In the event there is objection thereto, I will meet with counsel . . . in order to resolve the objections." None of the parties objected and the order was filed. The 1988 stipulated order specifically recites in pertinent part:

> IT IS FURTHER ORDERED, ADJUDGED AND DEGREED [sic] that, pursuant to the parties' agreement and the Court's approval thereof, the provisions of Section 42A-1-22 N.M.S.A. 1978 Comp. (Order of Immediate Possession Prior to Judgment) have been duly met (including but not limited to acknowledgement that the use sought for the subject property is a public use and that immediate possession is necessary), and that the parties are forever barred

---

[1] The New Mexico Eminent Domain Code, NMSA 1978, Sections 42A-1-1 to -34 (Repl. Pamp. 1981 & Cum. Supp. 1991), permits the parties to "agree to and carry out a compromise or settlement as to any matter, including all or any part of the compensation or other relief." § 42A-1-3. The Code also authorizes a court to grant a condemnor immediate possession of the property "if it finds that the use for which the property sought to be condemned is a public use and that immediate possession is necessary." § 42A-1-22.

> from asserting that any provision thereof was not met.

Intervenors demonstrated through agreement and lack of objection an intent to waive any challenge to the condemnation and the City's right to possess the property in exchange for permission to intervene. The City, in reliance upon this stipulation, withdrew objections to intervention by the Gallegoses and consented to the distribution of $240,000. The Schneiders' consent to the agreement is obvious. At no time prior to the April 1990 trial did intervenors attempt to have the stipulated order set aside. Moreover, the court's order of August 1989 ruled on several motions including *"intervenors' oral motion* to allow the City to condemn the Schneiders' property interest . . . and to dismiss the City's claims against the Schneiders pursuant to a partial final condemnation judgment." (Emphasis added.)

Intervenors accepted the benefits of the 1988 order by maintaining an action against the City for damages, and accordingly are estopped from challenging at trial the condemnation and subsequent possession and ownership by the City. *See Capo v. Century Life Ins. Co.*, 94 N.M. 373, 377, 610 P.2d 1202, 1206 (1980) ("estoppel by conduct arises when a party has been induced by the conduct of the other to do, or forebear from doing, something he [or she] would not have done but for such conduct"); *Reinhart v. Rauscher Pierce Sec. Corp.*, 83 N.M. 194, 198, 490 P.2d 240, 244 (Ct. App. 1971) (estoppel is preclusion, by acts or conduct, from asserting a right that otherwise might have existed, to the detriment and prejudice of another, who, in reliance on such acts and conduct, has acted thereon).

The record is absolutely clear that the court and the parties understood that only two issues were to be resolved at trial: (1) whether intervenors had a valid interest in the property based upon the purchase offer agreement, and, if so, (2) a determination of the property value. At the outset of trial, intervenors articulated the bifurcated nature of the issues, and recognized that if the contingencies in the purchase offer applied, the trial would end at that point. Accordingly, the court abused its discretion by entering findings of fact and conclusions of law on the legitimacy of the condemnation proceeding and by entering judgment that dismissed the City's petition in condemnation.

CITY HAS STANDING

We disagree with the district court's conclusion that the City lacked standing to challenge the validity of the Schneider-Gallegos purchase contract because it was not a party or a third-party beneficiary thereto. On intervenors' own motion, all right, title, and interest belonging to Schneiders passed to the City by the August 17, 1989 order, which obligated the City to pay $240,000 for the land. At the point in the proceedings when the Schneiders were dismissed from the suit and title was transferred to the City, the City then became the successor in interest with all rights and defenses as were available to the Schneiders. *See Pueblo de Taos v. Archuleta,* 64 F.2d 807 (10th Cir. 1933) (one who has acquired lands of defendant has rights of a defendant in defense of his or her title).

CONTRACT LAW

Intervenors' basis for their claim of a compensable interest is an alleged offer to purchase agreement. Shortly after the Schneiders listed the property, intervenors tendered an offer to purchase it for $240,000, subject to various terms. On June 28, 1988, Mr. Gallegos signed an offer to purchase agreement and addendum, which contained the following:

> It is mutually understood and agreed that the following terms and conditions shall be made a part of the above described Deposit Receipt and Agreement: (1) Contingent upon the State Highway Department granting ingress/egress from Highway #285/84; (2) Sellers agree to grant partial releases upon payment of $21,333.00/acre in addition to regular payments; (3) Contingent of the City of Espanola not condeming [sic] said property; (4) Contingent on the sale of a parcel of land to Contel.

The offer documents, the agreement and the addendum that was specifically referenced in the agreement, were signed by Mr. Gallegos and mailed to the Schneiders for signature. Mrs. Gallegos neither signed the agreement nor the addendum, although her name appears on each as one of the purchasers.

The agreement also contains a provision that states: "Any amendments or changes to this agreement shall be made in writing, and signed by all persons signing the original. No amendment or change not in writing and signed shall be valid." The agreement was never modified by a writing signed by the parties, nor was money

every tendered to the Schneiders. No closing took place and no contract was ever recorded.

Absent ambiguity, construction of a contract is a question of law. *Smith v. Price's Creameries*, 98 N.M. 541, 544, 650 P.2d 825, 828 (1982). It is the role of the courts to interpret and enforce a contract as written by the parties. *Boatwright v. Howard*, 102 N.M. 262, 264, 694 P.2d 518, 520 (1985). Here, performance under the offer was subject to several conditions, the plain language of which indicates that the occurrence of any one condition would terminate the parties' obligation to perform under the offer to purchase agreement. *See Western Commerce Bank v. Gillespie*, 108 N.M. 535, 537, 775 P.2d 737, 739 (1989) (performance not formation is conditional).

> Generally, a condition precedent is an event occurring subsequently to the formation of a valid contract, an event that must occur before there is a right to an immediate performance . . . . Whether conditions precedent are considered prerequisites to formation of a contract or prerequisites to an obligation to perform under an existing agreement is controlled by the intent of the parties.

Id. (citations omitted). Here, although the documents lacked the signature of one of the offerors, the Schneiders accepted the offer subject to various terms including the City not condemning the property. When there is a failure of a condition precedent through no fault of the parties, no liability or duty to perform arises. Thus, upon the filing of the condemnation action and the court's subsequent orders transferring title to the City and authorizing its immediate possession, neither party was obligated to

perform under the offer to purchase agreement, assuming it was legally valid and binding in the first instance.

Aside from the above conclusion, there remains a threshold question, and, in this case, a dispositive question, of whether a meeting of the minds to form a binding contract occurred. The record reveals a complete lack of evidence to support a meeting of minds between the Schneiders and intervenors regarding whether the conditions were made a part of the offer. It is elementary in contract law that mutual assent must be expressed by the parties to the contract. *Trujillo v. Glen Falls Ins. Co.*, 88 N.M. 279, 540 P.2d 209 (1975). Intervenors failed to met their burden of proving a meeting of the minds in order to establish a binding agreement. *See Garcia v. Middle Rio Grande Conservancy Dist.*, 99 N.M. 802, 807, 664 P.2d 1000, 1005 (Ct. App.), *cert. denied*, 99 N.M. 740, 663 P.2d 1197 (1983).

Five days after the Schneiders signed the agreement, the city condemned the property. Mr. Gallegos claims he attempted to waive the addendum contingencies relating to the condemnation action and sale of land to Contel in a November 9, 1988, letter to the Schneiders and the real estate agent. On November 17, the realtor wrote the Schneiders and requested they sign a letter authorizing the realtor to proceed with the closing and agreeing to the withdrawal of all the contingencies. The Schneiders refused and never indicated a willingness or desire to waive any of the contingencies. For example, in their February 23, 1989, memorandum in opposition to the City's motion for summary judgment, the Schneiders stated "[i]n the event the City initiated condemnation proceedings, the proposed [offer to purchase] agreement

would terminate." These events all occurred prior to the court's entry of the August 1989 order that entered partial final judgment in condemnation and transferred title to the City. Moreover, Gallegos' testimony that he did not intend the contingencies to become part of the agreement nor did he authorize the realtor to include them only emphasizes the lack of a meeting of the minds between the parties, and, thus, the lack of an enforceable agreement. A party may not take that portion of a proposed agreement that suits him or her and reject the remainder. *Lamonica v. Bosenberg*, 73 N.M. 452, 455, 389 P.2d 216, 218 (1964).

As recognized by the parties and the court on the first day of trial, if the contingency regarding condemnation applied, the trial would have been over without the need to make a determination of value. This recognition serves to underscore the importance of the issue of mutual assent and understanding concerning the contingencies. When the minds of the parties have not met on any part of a proposed contract, all of its provisions are a nullity. *Id.* Where one party meant one thing and the other party meant another, the difference going to the essence of the supposed contract, the court will find no contract in law or equity unless the court should find that one party knew or had reason to know what the other party meant or understood. *Trujillo*, 88 N.M. at 281, 540 P.2d at 211. The record clearly indicates that the Schneiders believed the offer was subject to all conditions contained in the addendum and that the agreement ended when the condemnation action was filed. "Until all understand alike, there can be no assent, and, therefore, no contract." 17 C.J.S. *Contracts* § 31 (1963). Thus, as a

matter of law, absent the formation of a valid contract, no legal or equitable basis exists for a claim of interest in the property by intervenors.

Based upon the above, we reverse the judgment and remand to the district court with direction to quiet title in the City of Espanola. The City is awarded its costs on appeal, which shall include $1,500.00 toward attorney fees for purposes of this appeal.

IT IS SO ORDERED.

/s/ Stanley F. Frost
STANLEY F. FROST, Justice

WE CONCUR:

/s/ Richard E. Ransom
RICHARD E. RANSOM, Chief Justice

/s/ Seth D. Montgomery
SETH D. MONTGOMERY, Justice

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Monday, August 10, 1992

NO. 20,062

CITY OF ESPANOLA,

Plaintiff-Appellant,

vs.

RONALD J. SCHNEIDER and
RHONDA A. SCHNEIDER,

Defendants,

and

RAYMOND GALLEGOS and
LOURDES GALLEGOS, his wife,

Intervenors-Appellees.

This matter coming on for consideration by the Court upon Motion of Appellees for Rehearing, and the Court having considered said motion and now being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the Motion of Appellees for Rehearing is denied.

ATTEST: A TRUE COPY

/s/ Kathleen Jo Gibson (SEAL)
Clerk of the Supreme Court
of the State of New Mexico